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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-164

PASADENA CITY BOARD OF EDUCATION, *et al.*,
Petitioners

vs.

NANCY ANNE SPANGLER, *et al.*,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Mexican American Legal Defense and Educational Fund, as Amicus Curiae

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BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AS AMICUS CURIAE

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By consent of the Petitioners and the Respondents, the Mexican-American Legal Defense and Educational Fund, Inc., files this brief as Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund (MALDEF), is a national, non-profit, non-partisan organization established in 1968 to secure and advance the civil rights of Mexican Americans through litigation and education. Since its inception, MALDEF has actively challenged practices which deny educational opportunity to Mexican Americans, including practices which result in segregation of Mexican American school children. This Court and lower federal courts have recognized that familiar practices of school segregation have been applied to Mexican Americans as well as to Black Americans. See, e.g., Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973); United States v. Texas Education Agency, Austin Independent

School District, 467 F.2d 848 (5th Cir. en banc 1972), Cisneros v. Corpus Christi Independent School District, 467 F.2d 142 (5th Cir. en banc 1972), cert. denied 413 U.S. 920 (1973). Amicus believes that the case at bar raises questions going to the vitality of the federal courts' power to provide adequate relief from the effects of such discriminatory practices. Moreover, the disposition of the case may affect ongoing desegregation litigation on MALDEF's education docket.[1/] For these reasons MALDEF notes the importance of the case at bar to other racial or ethnic minorities, and urges the Court to affirm the judgment below.

ARGUMENT

Introduction

This brief will not address the first two of the Questions presented by Petitioners' brief, viz, whether a District

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1. For example, Alvarado v. El Paso Independent School District, W.D. Tex. No. EP-70-CA-279; and Mendoza v. Tucson School District No. 1, D. Ariz. No. 74-204-TUC-WCF.

Court may "impose an absolute requirement of racial balance for all schools," or require a school district "continuously to maintain . . . a specified and permanent racial balance. . . ." (Pet. 2) First, it is not at all clear that the district court's unappealed 1970 order did impose such a requirement. It did contain that guideline, but read in context, it essentially ordered a plan to be designed meeting those general criteria. The Petitioners designed a plan which indeed met the criteria precisely. But whether those criteria were merely a "starting point for analysis" or a "rigid formula" was never really tested inasmuch as the Petitioners' own plan never sought permission to vary from the criteria. That is, the order's "rigidity" was never tested.

In any case, to the extent that the unappealed order can be so read and whether or not, if so read, such an order would be inconsistent with this Court's decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1970), is not really

an issue in the present posture of this case. The Court of Appeals "expressly disapprove[d] such portions of the record as suggest that the district court interprets his injunction to require continuous annual redistributing" (Pet. App. A11) to maintain racial balance. In other words, as we read the record in this case, Petitioners are not now required to maintain any particular racial balance in their schools. All that they are required to do is to operate a unitary system.

The remaining issues that this brief will address seem to us simple, but yet important.

Pasadena, like many hundreds of other school systems, was found to have illegally segregated its students. The District Court's 1970 findings and order were unappealed, presumably because the school board felt it legally futile to do so. Pursuant to the 1970 order, the School Board designed its own desegregation plan and sought the District Court's approval of the plan it had designed. It was

approved and its implementation ordered. The order requiring implementation of its plan was never appealed, presumably because the plan was of its own decision.

In the years 1970-74, the School Board's composition was changed by election, so that a majority of that board now consists of persons elected to the Board on platforms consisting of thinly veiled and sometimes open avowals to resegregate the school system.

The present proceeding arose in the form of a motion by the new Board requesting that the District Court terminate its continuing supervision over the board or, alternatively, that the Court permit the board to scrap its own implemented desegregation plan and substitute a new plan of its own design. As both courts below found, the new plan was intended, designed and would have the almost certain effect of reimposing racial segregation on all schools in the school system. The Board sought justification for its motion in the wholly frivolous grounds that it has

discharged its constitutional duty to operate a unitary school system by having achieved unitary status momentarily, and having once so achieved it, is now free, or ought to be now free, to reimpose a regime of segregated schools.

Part A of this Brief will discuss whether Petitioners are correct in asserting that the District Court must relinquish jurisdiction in this school desegregation case, where the record establishes that the first thing that the Board will do, if jurisdiction is relinquished, is to reimpose segregation in its school system.

Part B of this brief will discuss whether Petitioners are correct in asserting that their constitutional duty to operate a unitary school system is discharged by the achievement of momentary unitary status, after which achievement they are thereafter free to adopt a new pupil assignment plan that is designed to and will predictably result in rigidly segregated schools.

A. The District Court Did Not Abuse Its Discretion When It Denied The School District's Motion To Be Freed of Judicial Supervision Where That Refusal Was Based On Record Evidence That The First Act Of The District, If Freed Of Supervision, Will Be to Resegregate Its Schools.

The District Court did not abuse its discretion when it denied the school district's motion to be relieved of judicial supervision since that refusal is based on a record that established that the first act of that school district, if so relieved of supervision, will be to resegregate its schools.

The appropriate time for cessation of judicial supervision over a school system which has been ordered to desegregate must depend on the facts of each case in which the issue arises. Obviously, a desegregated school system, once segregated by law, is not, by reason of that former segregation, thereafter required to remain under judicial injunction forever. See Swann, supra, 402 U.S. at 31-32.

However, it is equally obvious that a District Court "should retain jurisdiction in school segregation cases to insure. . .that the goal of a desegregated, non-racially operated school system is. . . finally achieved." Raney v. Board of Education, 391 U.S. 443, 449 (1968) (emphasis added). This is, of course, but application of traditional equity principles to school segregation cases. In these, as in all other equity cases, a judicial injunction, once imposed, ought not be dissolved unless "the dangers, once substantial, have become attenuated to mere shadows," United States v. Swift & Co., 286 U.S. 106, 119 (1932).

On the unique facts of this case, it is simply incontestable that but for the continued jurisdiction of the District Court the goal of desegregated schools would only be fleetingly achieved and certainly not finally achieved. On the facts of case, it is obvious that the dangers of resegregation by Board action have not "become attenuated to mere shadows."

The new Board members have evidenced their intent to resegregate the Pasadena schools repeatedly. Their election platforms left little doubt as to their intentions. See J.A. 272-96. The new President of the Board and principal architect of the alternate plan now in issue, has designed at least three other such plans, all of which were intended to resegregate the schools. One of such plans even contemplated creation of separate white and black educational subdistricts within the Pasadena school district. J.A. 570, 575. The Board President testified that the Board plan was designed to "address ourselves to our customers. . .who have left our school system for private schools" (J.A. 499) and who would continue the "white boycott of our school system" (J.A. 502) unless permitted to attend neighborhood schools, which, given Pasadena's residential segregation, would result in racially identifiable schools (J.A. 329). In short, the intent of the board is to mollify "Caucasian families" (J.A. 502) by adopting, as soon as possible, a plan which would return whites to disproportionately white schools and blacks to black schools, i.e., to return to operation of a system in which most, if not all, schools would be racially identifiable.

The Petitioners' brief, pp. 18-20, misses completely the point of this record evidence. The question is not whether such speech "can, within the confines of the First Amendment, be made into a violation of the school desegregation decree." Rather, the question raised by this proof of intent is whether, in the face of such proof, it can be said that the dangers of state-imposed segregation in Pasadena "once substantial have become attenuated to mere shadows." Swift, supra. Obviously, given that intent, they have not.

Of equal importance, the evidence of purpose or intent to segregate is often a central, if not the sole, criteria for distinguishing de jure from de facto segregation. See Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973). Where, as here, a School Board

evidences clear intent to resegregate its schools, and requests freedom from judicial restraint in order to do so, it is impermissible to suggest that a district judge's refusal to grant that freedom is an abuse of his discretion.

The record evidence is not limited to those statements of intention, however, even though those statements by state officials were, in context, the type of "stimulant to racial prejudice" of which this Court spoke in Strauder v. West Virginia, 100 U.S. 303 (1880). Here, these statements of intent were accompanied by deeds suited to the words. The Board violated the plan terms of the desegregation order by appointing whites to high level administrative positions at non-public meetings of the Board and without prior public announcements of the available positions (J.A. 265), and it adopted the various proposed alternative plans without consultation with its only black member (J.A. 264-7). It has consistently attempted to undermine the operation of the present integrated school

plan (J.A. 458).

Most important, however, are the details of the Board's new plan. These details are discussed more fully in Part B hereof. For present purposes, it is enough to note that it would render most of the district's schools racially identifiable. Since the stated intention of the Board is to produce such schools, and their proposed plan, which they would adopt given the freedom to do so, is calculated to produce such schools in order to sell them to "Caucasian families," it would be irresponsible to relieve the district of judicial supervision at this time.

It is particularly ironic, in this case, that Petitioners base their request for relief from judicial supervision on the argument that the 1970 plan, as implemented, has resulted in a unitary system. The irony, of course, results when the Petitioners, in the next breath, admit that the sole purpose for which they seek relief from judicial supervision is to

scrap the very same plan they claim re-resulted in their unitary status. The final irony is that Petitioners then propose to replace their present "unitary" plan with one which resembles, in design and effect, the plan found to be segregatory in 1970 and which made necessary the adoption of the 1970 plan in the first place.

In short, however wise or attractive it may be to adopt a policy of dissolving jurisdiction over school desegregation cases as soon as implementation of a desegregation plan has been completed, such a policy has no place in this case.

B. The District Court Did Not Abuse Its Discretion When It Denied The School District's Motion To Adopt An Alternative School Desegregation Plan Which The Record Establishes Would Be Resegregative In Intent, Design And Effect.

The District Court did not abuse its discretion when it denied the school district's motion to modify its present

desegregation plan by adoption of a combination "neighborhood school, freedom of choice plan" the intent, design and effect of which would be to resegregate Pasadena's school system.

In 1970, Pasadena implemented a plan of its own, not the District Court's, design. That plan resulted in elimination of racially identifiable schools.

In 1974, the new board prepared an alternate plan (J.A. 239-247). The Alternate Plan, if it can be called a plan at all, is a collection of generalized goals containing few specific details. Among the few details given is a proposed division of the district into four zones, of approximately equal ethnic composition. Children in each zone are to be free to choose schools to be attended from among the schools in the zone. Beyond this bare bones outline, the plan contains a few concrete details.

For example, the plan contains no suggestion for dealing with oversubscrip-

tion to a particular school. Based on Pasadena's past history with a similar plan prior to 1970, we may assume that most white parents would choose schools located closest to their homes. If preferences in selections would be given to parents involving schools closest to their homes, the result would be that few, if any, blacks would be given any choice but to attend schools located in black residential areas, all other choices being preempted. The consequences of such a plan are described in J.A. 327. Schools could be expected to range from 3.3% white to 96.1% white, with most whites attending disproportionately white schools and most blacks attending disproportionately black schools (J.A. 327).

The President of the School Board testified that he and the Board expect some such result as a consequence of adoption of the plan. But, he added, that after "Caucasian families" are drawn back into the fold, the board could "begin to apply the kind of incentives that it will be necessary to get them

to move out of their neighborhood school" (J.A. 502).

What incentives? The proposed plan gives absolutely no details. It suggests some possibilities for "unique educational alternatives" to be located at each school site and it also hints at creation or expansion of "District-wide 'magnet schools' . . .to promote integration on a voluntary basis." (J.A. 240-1)

These generalized descriptions, or more accurately wishes, are hardly the stuff of which desegregation plans are made. The burden is on the School Board to "fashion steps which promise realistically" to effect a unitary system. Green v. County School Board 391 U.S. 430, 439 (1968) (emphasis added). Conjecture, fuzzy pipe dreams and lack of detail such as characterize the Board's alternate plan hardly bear a realistic promise to achieve anything but what its proponents plainly intend to achieve--a resegregated school system.

Surely, a school board seeking to modify an existing desegregation plan is under no less a burden of producing realistic details for a proposed plan then is a board first faced with designing a plan. And, as surely, no District Court can be held to have abused its discretion by refusing to approve a plan which is admitted by its designer and proponents to be expected to resegregate schools.

For the thousands of school children in the hundreds of school districts which have by now implemented desegregation plans, no crueler fate could be imagined than encouraging subversion of these plans by permitting modifications to them based on nothing but the frail need of imagination.

Conclusion

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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